IN THE

Supreme Court of the United States

October Term, 1960

No. 270

JAMES LAXA,

Petitioner,

—against—

STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Statement

Petitioner seeks a review of the judgment of the Court of Appeals of the State of New York entered on April 22, 1960, denying leave to appeal to that Court, from a judgment of the Appellate Division, Second Judicial Department, State of New York, 10 App. Div. 2d 646, which affirmed a judgment of the County Court of Kings County, State of New York, rendered on November 24, 1958, convicting the petitioner as a third (narcotic) felony offender upon his plea of guilty to the crime of violation of Section 1751 of the Penal Law, Subdivision 3 (possession of narcotics with intent to sell).

As a third (narcotic) felony offender, the petitioner was sentenced to Sing Sing State Prison for a term of 15 years to life, pursuant to Section 1941, Subdivision 2 of the Penal Law of the State of New York.

The Third (Narcotic) Felony Information filed by the District Attorney accused the petitioner of two previous narcotic felony convictions as follows:

The 1931 Narcotic Felony Conviction

1. The said defendant, on or about March 2, 1931, in the U. S. District Court for the Southern District of New York, of New York City, New York, was duly by law convicted upon his own confession and plea of guilty of the crime of Unlawfully dealing in and Selling Narcotic Drugs in violation of U. S. Code, Title 26, Section 692; Sections one and two, Act of December 17, 1914, as amended and U. S. Code, Title 26, Section 696, as charged in two counts of a certain indictment filed against him in the said Court, in the *first count* of which said indictment it is alleged that heretofore, to wit: on or about the 29th day of January, 1931, at the Southern District of New York, within the jurisdiction of this Court, James Lana, the defendant herein, unlawfully, wilfully and knowingly did sell to one Letty Krantz a certain quantity of a derivative and preparation of opium, to wit: one ounce, more or less, of diacetyl morphine hydrochloride, commonly known as heroin, not in the original stamped package, or from the original stamped package that is to say, that there was not affixed to the container in and from which the defendant sold the heroin as aforesaid, any Internal Revenue stamps whatsoever as required by Section 1, Act of December 14, 1914, as amended

(U. S. Code, Title 26, Section 692; Section 1, Act of December 17, 1914, as amended); and in the *second count* of which said indictment it is alleged that heretofore, to wit: on or about the 29th day of January, 1931, at the Southern District of New York and within the jurisdiction of this Court, James Lana, the defendant herein, unlawfully, wilfully and knowingly did sell to Letty Krantz a certain quantity of a derivative and preparation of opium, to wit: one ounce more or less of Diacetyl morphine hydrochloride, commonly known as heroin; that the defendant, as he then and there well knew, did sell the heroin as aforesaid, contrary to law in that the said sale was not in pursuance of a written order by the said Letty Krantz to the said defendant on a form issued in blank for that purpose by the Commissioner of Internal Revenue as provided by Section 2 of the Act of December 17, 1914, as amended (Section 2, Act of December 17, 1914, as amended; U. S. Code, Title 26, Section 696); Whereupon the said defendant, James Lana, was sentenced to imprisonment for the term of two years in the U. S. Penitentiary at Leavenworth, Kansas.

The said Crime of Unlawfully Dealing and Selling Narcotics in violation of U. S. Code, Title 26, Sections 692 and 696; and Sections 1 and 2, Act of December 17, 1914, as amended, would be felonious if the same were committed within the State of New York.

The 1937 Narcotic Felony Conviction

2. And the said defendant, on or about June 16, 1937, in the District Court of the United States of America for the Southern District of New York, at New York City, New York, before the Honorable Samuel Mandelbaum, a judge

of the said Court, was duly by law convicted upon his own confession and plea of guilty of the crimes of Unlawfully selling Narcotics and Conspiracy so to do in violation of Sections 1043 and 1044, Title 26, U. S. Code; Sections 173 and 174, Title 21 U. S. Code, and Section 88, Title 18, U. S. Code, under a certain indictment filed against him in the said Court under the name of James Lana, *in counts 1 to 18*, inclusive, in which said indictment the defendant is charged with the crime of Unlawfully selling Narcotics, and in count 19 of said indictment he is charged with the crime of Conspiracy to sell Narcotics, whereupon the said defendant James Lana was sentenced to be committed to the custody of the Attorney General of the United States or his authorized representatives, for imprisonment in a penitentiary for and during the term and period of four years on each of counts 1 to 18, inclusive, and two years on count 19, and fined $1.00 on each of 3, 6, 19, 12, 15, and 18, payment of which fines were remitted and the prison sentence on counts 1 to 19, inclusive, were to run concurrently.

The said crime of Unlawfully Selling Narcotic Drugs as charged in counts 1 to 18, inclusive, in violation of Sections 1043 and 1044, Title 26, U. S. Code and Sections 173 and 174 of Title 121 U. S. Code, would be felonious if the same were committed in the State of New York.

The Statute in Question

Section 1941, Subdivision 2 of the Penal Law of the State of New York, providing for punishment for a third narcotic felony conviction, is as follows:

"*1.* * * *

2. *A person, who, after having been twice convicted within this state, of a felony or of an attempt to commit a felony under section seventeen hundred fifty-one of this chapter or under any other law relating to narcotic drugs, or, under the laws of any other state, government or country, of a crime under any law relating to narcotic drugs which, if committed within this state, would be a felony, commits a felony under section seventeen hundred fifty-one of this chapter or under any other law relating to narcotic drugs, within this state, shall be sentenced upon conviction of such third offense to imprisonment in a state prison for an indeterminate term the minimum of which shall be not less than fifteen years, and the maximum thereof shall be his natural life.*"

Jurisdiction

The respondent objects to the jurisdiction on this petition for a Writ of Certiorari on the following grounds:

1. The petitioner has failed to raise a Federal question of *ex post facto* statute in any of the State Courts below (Rule 23(1)(f) United States Supreme Court; Title 28 U.S.C.A. Section 1257, Subd. 3).

2. The petitioner's contention of *ex post facto* legislation has been heretofore finally determined by this Court (Rule 19(1)(a). United States Supreme Court).

ARGUMENT

I.

The sole question presented by the petitioner in the State Courts below devolved on the petitioner's contention that the underlying Federal convictions were not "felonies" within the meaning of New York's multiple offender statute for the imposition of punishment to a life sentence as a third narcotic felony offender, under Section 1941, Subdivision 2 of the Penal Law of the State of New York.

In the petitioner's printed brief, submitted to the Appellate Division of the New York Supreme Court, Second Judicial Department, appears the following, at page 5:

> "We submit that two questions—purely of law—are presented here, and that these questions are necessarily dispositive of the appeal:
>
> 1. Was the County Court of Kings County (Barshay, J.) correct in ruling that the prior Federal conviction of 1937, under Sections 1043 and 1044, Title 26, U. S. Code (conspiracy) and Sections 173 and 174, Title 21, U. S. Code, amounted to a conviction of felony, under the laws of New York at that time?
>
> 2. Was the same Court correct in holding that the prior Federal conviction of 1931, under U. S. Code, Title 26, Sections 692 and 696 amounted to a conviction of felony, under the laws of New York at that time?
>
> We maintain, with all due respect, that the learned Judge below was in error; that it was not for a crime that would be a felony under New York standards at that time; that his Federal convictions, as afore-

> said, was improperly used as a predicate for additional punishment; since the Federal statutes in question in 1931 and 1937 include components of the crime which are not contained in the applicable statutes of the Penal Law and Public Health Law of this State during those years, this statute, therefore, has no counterpart under New York law, and the convictions had herein under such Federal statutes cannot be made the basis for multiple offender punishment in this State as provided by Section 1941, Penal Law."

The petitioner's contentions were thus limited, again, in the application for leave to appeal to the New York Court of Appeals, which was denied by Associate Justice Fuld of that Court.

Thus, it is clear that the question of an *ex post facto* statute was not raised in any of the State Courts below.

II.

There is a further failure of jurisdiction in that the precise question raised by the petitioner has already been heretofore determined by this Court in a closely parallel situation.

In *McDonald* v. *Massachusetts*, 180 U. S. 311, this Court definitively held that a Massachusetts statute imposing an additional punishment as an habitual offender for a third felony conviction, does not impose any additional punishment for the former crimes and is, therefore, not in violation of the Constitutional provisions against *ex post facto* laws.

In the *McDonald* case, *supra*, this Court stated:

"The fundamental mistake of the plaintiff in error is his assumption that the judgment below imposes an additional punishment on crimes for which he had already been convicted and punished in Massachusetts and in New Hampshire.

But it does no such thing. The statute under which it was rendered is aimed at habitual criminals; and simply imposes a heavy penalty upon conviction of a felony committed in Massachusetts since its passage, by one who had been twice convicted and imprisoned for crime for not less than three years, in this, or in another state, or once in each. The punishment is for the new crime only, but is the heavier if he is an habitual criminal. Statutes imposing aggravated penalties on one who commits a crime after having already been twice subjected to discipline by imprisonment have long been in force in Massachusetts; and effect was given to previous imprisonment, either in Massachusetts or elsewhere in the United States, by the statute of 1827, chap. 118, Sec. 19, and by the Revised Statutes of 1836, chap. 133, Sec. 13. It is within the discretion of the legislature of the state to treat former imprisonment in another state as having the like effect as imprisonment in Massachusetts, to show that the man is an habitual criminal. The allegation of previous convictions is not a distinct charge of crimes, but is necessary to bring the case within the statute, and goes to the punishment only. The statute, imposing a punishment on none but future crimes, is not ex post facto. It affects alike all persons similarly situated, and therefore does not deprive anyone of the equal protection of the laws. Moore v. *Missouri*, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179; *Ross's Case*, 2 Pick. 165; *Com.* v. *Graves*, 155 Mass. 163, 16 L. R. A. 256, 29 N. E. 579; *Sturtevant* v. *Com.*, 158 Mass. 598, 33

N. E. 648; *Com.* v. *Richardson*, 175 Mass. 202, 55 N. E. 988."

In accord is the decision of this Court, in *Graham* v. *West Virginia*, 224 U. S. 613, 623, and *People* v. *Raymond*, 96 N. Y. 38. See also, *Com.* v. *Graves*, 155 Mass. 163, 29 N. E. 579, 16 L. R. A. 256; *Blackburn* v. *State*, 50 Ohio St. 428, 36 N. E. 18.

III.

The petition should be denied.

Dated: Brooklyn, New York,
August, 1960.

Respectfully submitted,

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